Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-152

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

VERA M. ENGLISH,
Petitioner,
v.
GENERAL ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEVEN K. HOFFMAN
BRADLEY M. CAMPBELL
ROGOVIN, HUGE & SCHILLER
1250 24th Street, N.W.
Washington, D.C. 20037
(202) 467-8300
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the limited remedy available to "whistleblower" employees under Section 210 of the Energy Reorganization Act of 1978 for retaliation by nuclear facility operators preempts a state tort claim of intentional infliction of emotional distress.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. These organizations and their members have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments.

Amici have an abiding interest in preserving the power of state governments to protect their citizens from intentional tortious conduct and to provide common law reme-

dies for the victims of such conduct. This case is of grave concern to *amici* because of the casual inference by the courts below that Congress intended that a "whistle-blower" protection statute, Section 210 of the Energy Reorganization Act of 1978, 42 U.S.C. § 5851 ("ERA"), would preempt state tort laws that do not conflict with either the national labor laws or the federal nuclear regulatory scheme.

Like forty-one other States and the District of Columbia, the State of North Carolina recognizes a cause of action for the intentional infliction of emotional distress, whether the tortfeasor inflicts the harm in the workplace, in the public streets, or in the homes of its citizens. Like the other States, North Carolina provides remedies, including punitive damages, to victims of severe emotional distress caused by "outrageous" conduct. Affirmance of the Fourth Circuit's decision that Section 210 preempts part of that power will jeopardize the States' efforts to provide such protection and such remedies.

The inevitable effect of the Fourth Circuit's decision would be to immunize employers in the nuclear field from liability for conduct for which all other North Carolina employers are severely sanctioned, conduct that in no way implicates the federal interest in reporting nuclear safety hazards. It would also deprive nuclear employees of remedies available to all other similarly situated North Carolinians, remedies unavailable under the ERA. In short, affirmance of the decision below would severely circumscribe the ability of the States to proscribe and to redress conduct that transgresses the fundamental norms of a civilized society.

Amici submit that the decision below is wrong and should be reversed. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

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[1] Pursuant to Rule 37 of the Rules of this Court, the parties' letters of consent have been filed with the Clerk.

STATEMENT

For almost twelve years, petitioner Vera M. English ("English") worked for respondent, the General Electric Company ("GE"), as a laboratory technician inspecting nuclear fuel pellets containing uranium at GE's nuclear fuel processing facility in Wilmington, North Carolina. J.A. 8-10. In the course of her work, English witnessed serious safety violations and reported them to the Nuclear Regulatory Commission ("NRC") and to her GE supervisor in February 1984. J.A. 11. When GE failed to take corrective action, English took it upon herself to highlight those violations. J.A. 12. At the end of her work shift on March 10, 1984, English intentionally failed to clean up contaminated material left by other employees in the vicinity of her work station. J.A. 12. Instead, she highlighted the contaminated material with the red tape used for that purpose. J.A. 12. When she returned for her next shift on March 12, 1984, and found the area as she had left it, she informed her supervisor. J.A. 13.

At this point, GE suspended operations in the laboratory and took action to correct many of the problems English had identified. J.A. 13. On March 15, 1984, however, GE brought a series of written charges against English, ordered her removed from the laboratory, barred her from further work with radioactive materials, reassigned her to a position in a warehouse at the facility, and placed her on probation. J.A. 13-14. More pertinent for the purpose of the instant case is the abusive manner in which GE effected this discipline. First, it had English physically removed from the laboratory under guard, thereby exposing her to the ridicule of her fellow employees. J.A. 14. Then, for the next three months, it subjected her to a campaign of clearly visible surveillance and harassment, including forbidding her to eat in the company lunch room with her fellow employees. J.A. 14-15. As a result of GE's treatment, English suffered severe depression, requiring psychiatric treatment. J.A. 18. Finally, on July 30, 1984, having failed to place her

in another permanent position, GE discharged her. J.A. 16-17.

Consequently, on August 24, 1984, English filed a complaint against GE pursuant to Section 210 of the Energy Reorganization Act of 1978 ("ERA"), 42 U.S.C. § 5851. Section 210 provides an administrative cause of action to employees in the nuclear industry who believe that they have been discharged or otherwise discriminated against with respect to compensation, terms, conditions, or privileges of employment because they have reported safety violations. 42 U.S.C. § 5851(a)-(g). Although codified with the provisions governing the operation of the NRC, Section 210 delegates to the Secretary of Labor the task of investigating complaints by whistleblowers. In the event that the Secretary finds a violation of the statute, she is authorized to order the complainant reinstated to her former position and to award back pay. 42 U.S.C. § 5851(b)(2)(B). In addition, the Secretary "may" award compensatory damages to the complainant. *Ibid.* The Secretary dismissed English's complaint as untimely, and the Fourth Circuit Court of Appeals affirmed. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).[2]

English then brought this diversity action against GE in federal district court in North Carolina, alleging state law claims for wrongful discharge and intentional infliction of emotional distress and seeking compensatory and punitive damages. The district court dismissed the wrongful discharge claim. Pet. App. 25a.[3] Relying on *Dixon*

[2] Although the court of appeals affirmed, it remanded the case for consideration of the timeliness of English's claim of a continuing violation of the statute. 858 F.2d at 964. When an administrative law judge dismissed that claim as well, English appealed to the Secretary. That appeal is still pending.

[3] It did so on the alternative grounds that English had failed to state a claim for wrongful discharge under North Carolina law and that Section 210 of the ERA preempted wrongful discharge claims. Pet. App. 23a-25a. English did not appeal the dismissal of her wrongful discharge claim.

v. Stuart, 85 N.C. App. 338, 354 S.E. 2d 757 (1987), the court held that English had indeed stated a cause of action for intentional infliction of emotional distress by alleging that GE had wilfully and maliciously engaged in " 'extreme and outrageous' " conduct toward her, causing her to suffer "severe emotional distress." Pet. App. 27a. The court further held, however, that this claim was preempted by Section 210 of the ERA. *Id.* at 28a-29a.

The district court recognized that English's complaint only tangentially concerned nuclear safety; therefore, it could not be preempted on the ground that it impinged on a matter committed exclusively to federal regulation. Pet. App. 17a, 18a. Rather, the court concluded that Section 210 itself was so comprehensive as to preclude any effort by the States to supplement its remedial provisions. *Id.* at 22a-23a. The court expressly declined to apply this Court's decision in *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977), to the case before it—although *Farmer* squarely held that the remedial procedure for employment discrimination administered by the National Labor Relations Board did not preempt a state claim for intentional infliction of emotional distress—on the ground that *Farmer* created only a " 'narrow exception to federal preemption.' " Pet. App. 28a. Finally, the court indicated its belief that English's emotional distress claim should be presented to the Secretary of Labor because all but one of the allegations supporting that claim could also support a Section 210 proceeding. *Ibid.* In a brief *per curiam* decision, the Fourth Circuit adopted the district court's reasoning and affirmed. *Id.* at 2a-3a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns an issue close to the core of the States' unquestioned interest in matters relating to public health and safety: the power to provide a remedy for conduct that is intolerable in a civilized society. In holding that petitioner's claim for intentional infliction of emotional distress was preempted by Section 210 of the

ERA, the lower courts not only trivialized that fundamental state interest but also disregarded this Court's ample indications that such causes of action are not displaced by federal regulations either in the field of atomic energy or in labor relations.

Initially, the courts below failed to heed the lesson of *Farmer v. Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290 (1977). In *Farmer*, this Court recognized the States' compelling interest in redressing the intentional infliction of emotional distress and held that the claim could comfortably coexist with the comprehensive federal scheme regulating discrimination in employment created by the National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947—the models for Section 210. Erroneously concluding that *Farmer* created only a "narrow exception to federal preemption," the district court rested its preemption analysis on what it deemed to be the pervasiveness of Section 210's remedial mechanism and a potential for conflict between that scheme and petitioner's otherwise valid cause of action.

In reaching this conclusion, the court failed to take adequate cognizance of the larger regulatory scheme that Congress established in the Atomic Energy Act of 1954, of which Section 210 of the ERA is a part. As this Court held in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the federal nuclear regulatory scheme, like the federal labor law apparatus, accommodates common law remedies for the sort of "outrageous" misconduct at issue in this case. Further, *Silkwood* confirmed the presumption against inferring preemption of state causes of action that would deprive a class of individuals of protection from intentional tortious misconduct. Therefore, without explicit congressional direction on the subject, the Court would not find preemption of a state cause of action unless that cause of action created palpable interference or direct conflict with federal interests.

Although there is no express statement of congressional preemptive intent in Section 210, the district court purported to find both interference and conflict. In doing so, however, the court ignored the analytical standards that this Court has devised for making such evaluations in the *Farmer* line of cases and, more recently, in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), and *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). In its analysis, the court also overlooked the host of traditional methods the federal and state courts can employ to ensure that adjudication of petitioner's claim would not encroach even tangentially upon federal interests.

To remove the threat to the States' interest the decisions below portend, this Court should explicitly reaffirm the principle of *Silkwood* and *Farmer*: that the States' traditional authority to redress intentional torts should not be displaced in the absence of explicit congressional direction unless a particular state regulation actually interferes or conflicts with federal interests. Because petitioner's damages claim for intentional infliction of emotional distress creates no such interference or conflict with Section 210, there is no basis for preempting that claim.

ARGUMENT

I. THE STATES' COMPELLING INTEREST IN REMEDYING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN THE EMPLOYMENT CONTEXT PRECLUDES PREEMPTION OF THAT CLAIM.

A. The States Have Firmly Established Their Interest In Remedying The Intentional Infliction Of Emotional Distress Both In And Outside The Workplace.

The States' interest in affording common law protection to their citizens from the intentional infliction of emotional distress is close to the core of their unquestioned interest in protecting the health and wellbeing of their citizens. *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 303 (1977). At least forty-two States and the District of Columbia have

definitively recognized the tort.[4] Most have adopted

[4] Thirty-nine jurisdictions have adopted the formulation of the tort in the *Restatement (Second) of Torts* (1965); *American Road Serv. Co. v. Inmon*, 394 So. 2d 361 (Ala. 1981); *Richardson v. Fairbanks North Star Borough*, 705 P.2d 454 (Alaska 1985); *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W. 2d 681 (1980); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970); *Murray v. Bridgeport Hosp.*, 40 Conn. Sup. 56, 480 A.2d 610 (1984); *Howard Univ. v. Best*, 484 A.2d 958 (D.C. App. 1984); *Ailetcher v. Beneficial Fin. Co.*, 2 Haw. App. 301, 632 P.2d 1071 (1981); *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980); *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961); *Amsden v. Grinnell Mutual Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972); *Dawson v. Associates Fin. Serv. Co.*, 215 Kan. 814, 529 P.2d 104 (1974); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979); *George v. Jordan Marsh Co.*, 359 Mass. 244, 268 N.E.2d 915 (1971); *Warren v. June's Mobile Home Village & Sales*, 66 Mich. App. 386, 239 N.W.2d 380 (1976); *Hubbard v. United Press Int'l*, 330 N.W.2d 428 (Minn. 1983); *Pretsky v. Southwestern Bell Tel. Co.*, 396 S.W.2d 566 (Mo. 1965); *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975); *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (1981); *Plante v. Engel*, 469 A.2d 1299 (N.H. 1983); *Hume v. Bayer*, 157 N.J. Super. 310, 428 A.2d 966 (1981); *Sanders v. Lutz*, 784 P.2d 12 (N.M. 1989); *Fischer v. Maloney*, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Muchow v. Lindblad*, 435 N.W.2d 918 (N.D. 1989); *Yeager v. Local Union 20, Teamsters*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983); *Breeden v. League Servs. Corp.*, 575 P.2d 1374 (Okla. 1978); *Pakos v. Clark*, 253 Or. 113, 453 P.2d 682 (1969); *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970); *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I. 1984); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 259 S.E.2d 812 (1979); *Medlin v. Allied Invest. Co.*, 217 Tenn. 469, 398 S.W.2d 270 (1966); *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974); *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978); *Grimsby v. Samson*, 85 Wash. 2d 52, 530 P.2d 291 (1975); *Kanawha Valley Power Co. v. Justice*, 383 S.E.2d 313 (W.Va. 1989); *Alsteen v. Gehl*, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

Three jurisdictions recognize the tort without expressly adopting the *Restatement* formulation: *Pack v. Wise*, 155 So.2d 909 (La. App. 1963); *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983); *First Nat'l Bank v. Bragdon*, 84 S.D. 89, 167 N.W.2d 381 (1969).

Florida courts are split on the question of adopting the *Restatement* version. See *Ford Motor Credit Co. v. Sheehan*, 373 So. 2d 956 (Fla. 1st Dist. Ct. App.), cert. dismissed, 379 So. 2d 204 (Fla. 1979); *Gellert v. Eastern Air Lines*, 370 So. 2d 802 (Fla. 3rd Dist. Ct. App. 1979).

some variation on the formulation of the tort set forth in the *Restatement (Second) of Torts*, § 46(1) (1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." See *supra* at 8 n.4. "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficent to trigger liability. *Restatement*, § 46(1) comment d. Rather, to be actionable, the tort-feasor's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Ibid.* Similarly, the States do not afford relief for mere hurt feelings: "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Ibid.* comment j. North Carolina sets a comparably high threshold for stating a claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Because actionable conduct must be "outrageous" and therefore deserving of punishment, a successful claimant may often receive both compensatory and punitive damages.[5]

Like the other States that have recognized the tort, North Carolina entertains claims for intentional inflic-

[5] See generally Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 54 (1982) (hereinafter *"Intentional Infliction"*).

None of the reported decisions reviewed suggests that reinstatement or other tangible employment benefits are available as a remedy for the intentional infliction of emotional distress.

tion of emotional distress that arise in the employment context. *E.g., Dixon,* 354 S.E.2d at 753-59. Such claims are subject to the same high threshold imposed on claims outside the employment context.[6] For instance, the transitory emotional upset accompanying unfair or unpleasant work assignments, heavy workload, or other terms and conditions of employment is not actionable.[7] Neither is the mere fact of unfair dismissal[8] or other forms of employment discrimination.[9] Finally, neither employment discrimination nor outright dismissal meted out in retaliation for whistleblowing is actionable unless the claimant can establish that such retaliation is accompanied by or perpetrated with the requisite level of "outrageous" conduct.[10] The often severe deprivations

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[6] As one commentator has found after studying cases deciding such claims in the employment context,

> [o]nly the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation and humiliation warrant judicial relief through the tort of intentional infliction of emotional distress. All other forms of supervisory conduct that cause workers to experience emotional harm are more or less "trivial" in the terminology of the *Restatement of Torts.*

Austin, *Employer Abuse, Worker Resistance and the Tort of Intentional Infliction of Emotional Distress,* 41 Stan. L. Rev. 1, 18 (1988) (hereinafter "*Employer Abuse*").

[7] *E.g., Peterson v. First Federal Sav. & Loan Ass'n,* 617 F. Supp. 1039 (D. St. Croix 1985) (working conditions); *Burgess v. Chicago Sun-Times,* 132 Ill. App. 3d 181, 476 N.E. 2d 1284 (1983) (work assignments).

[8] *E.g., Pelizza v. Reader's Digest Sales & Serv. Inc.,* 624 F. Supp. 806 (N.D. Ill. 1985); *Batchelor v. Sears Roebuck & Co.,* 574 F. Supp. 1480 (E.D. Mich. 1983).

[9] *E.g., Oldfather v. Ohio Dep't of Transp.,* 653 F. Supp. 1167 (S.D. Ohio 1986); *Kersul v. Skulls Angels Inc.,* 130 Misc. 2d 345, 495 N.Y.S. 2d 886 (Sup. Ct. 1985).

[10] See, *e.g., Pratt v. Caterpillar Tractor Co.,* 149 Ill. App. 3d 588, 500 N.E. 2d 1001 (1986) (discharge in retaliation for refusal to violate federal statute does not sustain a state law outrage claim);

an employee may suffer as a result of discrimination in the workplace do not alone give rise to a claim of intentional infliction of emotional distress. The cause of action is only available to compensate for truly severe emotional distress suffered as a result of conduct that passes all recognized boundaries of social interaction.

B. This Court Has Determined That The States' Compelling Interest In Remedying The Intentional Infliction Of Emotional Distress Is Peripheral To The Federal Interest In Remedying Discrimination In The Workplace.

In *Farmer*, this Court held that the federal labor laws enacted to protect workers against discrimination in employment do not preempt a claim of intentional infliction of emotional distress. In so holding, the Court devised an analytical framework that should be dispositive of the preemption issue here. *Farmer* arose out of alleged discriminatory treatment in job referrals at a union hiring hall. The plaintiff alleged, *inter alia,* that the defendants "had intentionally engaged in outrageous conduct, threats, and intimidation, and had thereby caused him to suffer grievous emotional distress resulting in bodily injury." 430 U.S. at 293. The Court recognized that this claim "might form the basis for unfair labor practice charges before the [National Labor Relations] Board" (*ibid.* at 302), and, quoting *Vaca v. Sipes,* 386 U.S. 171 (1967), expressly indicated that " 'potentially conflicting [state] "rules of law, of remedy, and of administration" cannot be permitted to' " invade the province of the Board. 430 U.S. at 295 (quoting *Vaca v. Sipes,* 386 U.S. at 178-79 (1967) (quoting *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 242 (1959))). In analyzing the preemption question, however, the Court applied the rule developed in *Garmon*:

Kirwin v. New York State Office of Mental Health, 665 F. Supp. 1034 (E.D.N.Y. 1987) (reassignment in retaliation for cooperation with investigator); *Polson v. David,* 635 F. Supp. 1130 (D. Kan. 1986) (termination for objection to noncompliance with antidiscrimination laws). See generally *Employer Abuse* at 5-15.

namely, that preemption would not be appropriate if the activity complained of "'was a merely peripheral concern of the Labor Management Relations Act . . .[or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'" *Farmer*, 430 U.S. at 296-97, quoting *Garmon*, 359 U.S. at 243-44.

With that analytical framework in place, the *Farmer* Court held that "[t]he State . . . has a substantial interest in protecting its citizens from" the intentional infliction of emotional distress. 430 U.S. at 302. It further held that whatever "potential for interference" the adjudication of the tort might pose for the NLRB was insufficient to warrant preemption of the state tort action. *Id.* at 304.

Farmer, moreover, is only one in an unbroken series of decisions in which this Court has vindicated the States' plenary power to remedy intentionally tortious conduct, even when that conduct arises in the context of a labor dispute within the primary jurisdiction of the NLRB. See *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-512 (1983) (misrepresentation); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 207 (1978) (trespass by picketing); *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 59-61 (1966) (malicious libel); *International Union, UAW v. Russell*, 356 U.S. 634, 646 (1958) (malicious interference with lawful occupation by means of mass picketing); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 669 (1954) (intimidation by picketing with threats of violence).

These cases establish a heightened standard for preemption—even in the pervasively regulated and predominately federal preserve of employment relations—when the States' interest is as substantial as it is in regulating intentional tortious conduct like the intentional infliction of emotional distress. See *Garmon*, 359 U.S. at

244; see also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) ("pre-emption should not be lightly inferred" in areas "within the traditional police power of the State").

II. CONGRESS DID NOT INTEND THE ENERGY REORGANIZATION ACT'S REMEDY FOR EMPLOYMENT DISCRIMINATION AGAINST WHISTLEBLOWERS TO SUPPLANT THE STATES' SETTLED AUTHORITY TO PROTECT EMPLOYEES FROM OUTRAGEOUS CONDUCT.

In determining the preemptive scope of a federal enactment, "'"[t]he purpose of Congress is the ultimate touchstone."'" *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). When Congress has not made the preemptive scope of a given enactment explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'" *Allis-Chalmers*, 471 U.S. at 209 (quoting *Malone*, 435 U.S. at 504). This Court has been particularly slow to infer an intent to preempt a state cause of action relating to public health and safety because, as the Court declared in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), Congress is presumed to act "within the larger body of state law promoting public health and safety," an area in which "States traditionally have had great latitude." *Id.* at 756.

Neither Section 210 nor its legislative history speaks directly to the issue of preemption. The district court, however, concluded that Section 210 preempted petitioner's right to state remedies against outrageous misconduct because the statute constituted "'a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States

to supplement it.'" Pet. App. 22a-23a (quoting *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983)). In fact, the structure of the statute and its legislative history demonstrate that Congress never intended to displace the States' fundamental authority to protect their citizens from the intentional infliction of emotional distress, even if such misconduct were perpetrated in the employment context. See *Farmer*, 430 U.S. at 302.

A. Congress Did Not Intend The Whistleblower Provision To Preempt The States' Authority To Regulate Intentional Torts Like The Intentional Infliction Of Emotional Distress.

1. The Atomic Energy Act accommodates state causes of action to remedy extreme tortious conduct.

Section 210 of the ERA was enacted in 1978 as part of an appropriations package for the NRC. Pub. L. No. 95-601, 92 Stat. 2947 (1978). As such, it became part of the overall regulatory scheme initially devised by the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* ("AEA"). S. Rep. No. 848, 95th Cong., 2d Sess. 29, reprinted in 1978 U.S. Code Cong. & Admin. News 7303, 7303 (hereinafter "S. Rep."). This Court has thoroughly reviewed the AEA and its legislative history and has concluded that Congress intended to displace state regulation concerning the safety aspects of nuclear facilities. *Pacific Gas & Electric*, 461 U.S. at 212-13. The Court also concluded that Congress did not intend to displace state regulation in *all* matters nuclear. As the Court declared in *Pacific Gas & Electric* itself, "Congress, by permitting regulation 'for purposes other than protection against radiation hazards' underscored the distinction . . . between the spheres of activity left respectively to the Federal Government and the States." *Id.* at 210 (quoting 42 U.S.C. § 2021(k)).

Accordingly, this Court has upheld an award of punitive damages under state law to an employee of a nu-

clear facility who had been contaminated by plutonium. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). As the jury instructions in *Silkwood* indicate, those damages were predicated on extreme misconduct analogous to that alleged here:

> "The jury may give damages for the sake of example and by way of punishment, if the jury finds the defendant or defendants have been guilty of oppression, fraud, or malice, actual or prerumed. . . .
>
> [Exemplary damages] may be allowed when there is evidence of such recklessness and wanton disregard of another's rights that malice and evil intent will be inferred."

Id. at 244-45 (quoting *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 603 (W.D. Okla. 1979)).[11] Although the *Silkwood* Court expressly noted its recent decision in *Pacific Gas & Electric* (464 U.S. at 249), it nevertheless declined to find a congressional intent to preempt the punitive damages award.[12]

Thus, even in cases implicating the decidedly federal preserve of nuclear safety, the Court has declined to infer that Congress has so completely and pervasively regulated the field as to preempt state regulation of oppressive, fraudulent, or malicious conduct. *Silkwood*, 464 U.S. at 256. On the contrary, preemption analysis in matters nuclear would henceforth focus on whether "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objec-

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[11] The tort of intentional infliction of emotional distress furthers the goals typically associated with punitive damages: punishment, deterrence, encouragement of suits to redress social wrongs, complete compensation, and the reaffirmation of societal values. *Intentional Infliction* at 54 n. 63.

[12] The Court cited *Laburnum*, 347 U.S. at 663-64, which held that Congress did not intend for the federal labor laws to preempt state causes of action to redress intentional torts. *Silkwood*, 464 U.S. at 251.

tives of the federal law." *Ibid.*; see also *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1712 (1988).

2. *The ERA evinces no congressional intent to preempt a claim of intentional infliction of emotional distress.*

The district court in this case correctly determined that Section 210 of the ERA did not purport to regulate nuclear safety and therefore fell outside the limited scope of federal nuclear safety regulation determined in *Pacific Gas & Electric* to preempt state law. Pet. App. 17a, 18a. The structure of the statute and its legislative history amply support that judgment. The lower court also held, however, that Section 210 established a scheme so pervasive as to leave no room for concurrent state regulation of intentional infliction of emotional distress. *Id.* at 22a-23a. In doing so, it ignored the clear direction of *Silkwood* as to the "pervasiveness" of the federal interest in nuclear regulation. It just as clearly erred in its conclusion that Section 210 "pervasively" regulated nuclear employment.[13]

Section 210 was enacted along with a series of measures to fund the NRC's efforts in projects directly concerned with nuclear safety: *i.e.*, nuclear reactor regulation; the development of low level radiation standards and nuclear materials safety and safeguards; and research into improved safety systems, the health effects of low level ionizing radiation, and safe disposal of nuclear waste. Pub. L. No. 95-601, 92 Stat. 2947-51. Section 210, however, was set apart from the safety-oriented provisions with its own heading: "Employee Protection." *Id.* at 2951. According to the Senate Report on the Act, the provision was expressly designed to "offer[] protection to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit under [the ERA] or the Atomic Energy Act." S. Rep. at 29, reprinted in 1978 U.S. Code Cong. & Admin. News at 7303. As if to underscore just how remote Congress's intent in enacting Section 210 was from the radiological safety concerns of the companion provisions of the ERA, Congress delegated the task of enforcing Section 210 to the Secretary of Labor—not to the NRC. 42 U.S.C. § 5851(b)(1).

[13] Rather than address the purposes that animated Congress, the district court simply assumed that the comprehensiveness of Section 210's provisions supported an inference of preemption. Pet. App. 22a-23a. This Court has long held, however, that the mere fact that a statute is comprehensive is not sufficient to support an inference of preemption. *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 512 (1986); *Hillsborough County v. Automated Med. Laboratories*, 471 U.S. 707, 717 (1985).

The Senate Report also makes clear that the origins of Section 210 lie in areas not even vaguely connected with matters nuclear. In fact, the Section "is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act," and "[t]he legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act and a [subsequent and] similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners." S. Rep. at 29, reprinted in 1978 U.S. Code Cong. & Admin. News at 7303.

The ultimate source of Section 210, then, is the so-called "National Labor Management Act," a statute that does not exist but is presumably an amalgamated reference to the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.* ("NLRA"), and the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.* ("LMRA"), which amended the NLRA. See *Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1147 (1st Cir. 1989) (repeating misnomer but citing 29 U.S.C. § 158). In fact, the language of Section 210 is virtually identical to the NLRA language in 29 U.S.C. § 158(a)(4), which makes it an unfair labor practice for an employer to discriminate in employment terms

and conditions against an employee because that employee has filed an unfair labor practice charge or given testimony in an unfair labor practice proceeding before the NLRB—*i.e.*, a whistleblower.[14]

The remedial structure of the two whistleblower provisions also confirms that both were primarily conceived as labor-protective measures. They prescribe parallel administrative procedures before agencies charged with implementing labor policy: for whistleblowers under the LMRA, before the NLRB, 29 U.S.C. § 160; for nuclear whistleblowers, before the Secretary of Labor, 42 U.S.C. § 5851(b)(1). In each case, complaints alleging retaliatory discrimination must be filed within a short time period after the alleged violation takes place: for whistleblowers under the LMRA, six months, 29 U.S.C. § 160(b); for nuclear whistleblowers, thirty days, 42 U.S.C. § 5851(b)(1). In both instances, the administrative agency has limited authority to redress a complainant's injuries. The NLRB can order a discriminating employer to cease and desist from its discrimination and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c).

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[14] Title 29 U.S.C. § 158(a) provides as follows:

> It shall be an unfair labor practice for an employer— . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

As embellished in 29 U.S.C. § 158(a)(3), the use of the term "discrimination" in § 158(a)(4) is to be understood as "discrimination in regard to hire or tenure of employment or any term or condition of employment."

The pertinent part of Section 210, with the 29 U.S.C. § 158(a)(4) language italicized, provides as follows:

> No *employer* . . . may *discharge* any employee *or otherwise discriminate against any employee* with respect to his compensation, *terms, conditions,* or privileges *of employment because the employee* [has commenced a proceeding under the AEA or testified in such proceeding].

42 U.S.C. § 5851(a).

Similarly, the Secretary of Labor can order a discriminating nuclear employer to abate its discrimination and to "reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment." 42 U.S.C. § 5851(b)(2)(B). In addition, the Secretary "may" order the violator "to provide compensatory damages to the complainant." *Ibid.* Neither the NLRB nor the Secretary, however, is authorized to award a complainant punitive damages. *Russell*, 356 U.S. at 646 (NLRB); Pet. App. 21a (Secretary).

Given Congress's express declaration that Section 210 of the ERA was modeled on the NLRA, as amended by the LMRA, and given the close similarity between the remedial provisions of Section 210 and the analogous remedial provisions relating to unfair labor practices, it must be presumed that in enacting Section 210, Congress did not intend to regulate employment discrimination in the nuclear field more pervasively that it had in the federal labor laws regulating employment in other industries affecting commerce. As this Court made abundantly clear in *Farmer* and related cases (see *supra* pages 11-15), neither the NLRA nor the LMRA evinces a congressional intent to preempt a cause of action for the intentional infliction of emotional distress. These cases make similarly clear that Congress did not intend such preemption in Section 210 of the ERA.[15]

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[15] When Congress expressly models one remedial labor statute on another, this Court's interpretation of the one has consistently been informed by its decisions under the other. See, *e.g.*, *Leedom v. Kyne*, 358 U.S. 184, 189-91 (1958) (whether NLRA extinguished jurisdiction to enforce statutory right or remedy to be decided under precedent of Railway Labor Act ["RLA"]); see also *Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225, 1230 (1989) ("carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA").

B. Preemption Of The State Claim Presented Would Impermissibly Eliminate Or Curtail A Remedy For The Victims Of Intentional Torts.

Silkwood declined to infer from congressional silence an intent to preempt state law remedies for personal injuries from radiation because the Court found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251. More recently, in reaffirming *Silkwood*, the Court reiterated its reluctance to infer the preemption of state law remedies, concluding that such remedies exert only "incidental regulatory pressure" on the federal interest in nuclear regulation. *Goodyear Atomic Corp.*, 108 S. Ct. at 1712. This reluctance extends not just to the elimination of a state remedy but also to the curtailment of such remedies. See *Laburnum*, 347 U.S. at 666-67. Thus, in *Russell*, 356 U.S. at 641-42, and in *Laburnum*, 347 U.S. at 663-64, this Court held that the NLRB's inability to award monetary relief (other than back pay) or punitive damages counseled against, rather than for, preemption of state-sanctioned causes of action permitting such awards.

The decisions below work precisely the sort of curtailment that this Court refused to countenance in *Silkwood*, *Russell*, and *Laburnum*. If Section 210 were to preempt state remedies for intentional infliction of emotional distress, petitioner would be deprived of a significant portion of damages available to her under state law, and other nuclear employees would be deprived of any remedy for the kind of "outrageous" misconduct alleged here. Petitioner would be deprived of punitive damages because the Secretary of Labor has no authority to award such damages. Pet. App. 21a. *Silkwood* precludes that result. Petitioner's right to compensatory damages would also be impermissibly diminished. Although Section 210 permits the Secretary of Labor to award compensatory damages to an aggrieved whistleblower, that award is purely discretionary. See 42 U.S.C. § 5851(b)(2)(B) (the Secretary "may" order the employer to provide compensatory damages to the complainant); 29 C.F.R. § 24.6(b)(2) (the Secretary "may, where deemed appropriate, order the party charged to provide compensatory damages to the complainant"). *Russell* and *Laburnum* preclude that impact.

Some nuclear employees would suffer even greater deprivation. Section 210(g) makes the statutory remedy under Section 210(a)-(b) unavailable to an employee who has deliberately caused a violation of a nuclear safety requirement, even if the employer's retaliatory actions are unrelated to that violation. 42 U.S.C. § 5851(g). Preemption of state law remedies for intentional tortious conduct like the intentional infliction of emotional distress would leave such employees without any remedy, no matter what outrageous conduct (short of outright criminal conduct) their employer might inflict on them. There is no indication that Congress intended such a result; and any such intent is unlikely in a statute designed to "offer[] protection to employees." S. Rep. at 29, reprinted in 1978 U.S. Code Cong. & Admin. News at 7303.

III. STATE REMEDIES FOR THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NEITHER INTERFERE NOR CONFLICT WITH THE REMEDIES PROVIDED BY THE ERA.

As demonstrated above, the state interest in providing protection against and redress for the intentional infliction of emotional distress lies at the periphery of the federal interest in prohibiting discrimination in the workplace. *Farmer*, 430 U.S. at 302. Moreover, Section 210 and its legislative history manifest no suggestion that federal protection for nuclear whistleblowers was to be "pervasive." See *supra* pages 13-19. Accordingly, the preemptive reach of Section 210 depends on "whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objec-

tives of the federal law." *Silkwood*, 464 U.S. at 256. Although the district court in this case recited the correct *Silkwood* preemption standard, its application of it was severely flawed.

A. A State Remedy To Redress Tortious Conduct Does Not Interfere With The Section 210 Remedial Scheme Because The State Need Not Resolve Or Intrude On Issues Of Federal Law Or Policy.

The district court found interference with the federal interest in this case because it concluded that all but one of English's factual allegations supporting her charge of intentional infliction of emotional distress concerned "terms, conditions, or privileges of employment" and therefore were essentially identical to allegations necessary to support a claim under the federal whistleblower statute. Pet. App. 18a, 28a. Because the lower court failed to focus on the correct factors in its analysis, it reached the wrong conclusion.

According to this Court, the potential for interference of state law with federal laws is at a minimum "where the particular rule of law sought to be invoked before another tribunal is so constructed and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-98 (1971). A state rule of law is "constructed and administered" in the requisite fashion when the state claim at issue is not "identical" to the federal claim or "substantially dependent" on the application or interpretation of a federal statute, standard, or policy. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394-95 (1987).

In determining whether a state cause of action is identical to or "substantially dependent upon" federal law, a court must analyze the *legal* elements of the respective controversies—not the factual allegations used to support those legal propositions. *Farmer*, 430 U.S. at

305. If the state court controversy can be resolved without addressing or resolving an issue of federal *law*, disposition of the state claim cannot be said to interfere with the federal cause of action. *Ibid.* If resolution of the state and federal claims calls only for consideration of the same *facts*, the state claim does not interfere with the federal claim so as to warrant preemption of it. *Ibid.*; see *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 (1988).

This Court held in *Farmer* that the respective controversies to be decided in a state claim of intentional infliction of emotional distress and a federal claim of discrimination in employment are sufficiently distinct to preclude interference with the federal scheme. 430 U.S. at 303-04. It so held because neither adjudicating forum would resolve legal issues that were the province of the other. *Id.* at 304-05. Because none of the legal issues in an intentional infliction of emotional distress claim would be part of a Section 210 discrimination proceeding—and vice versa—the claims are not identical.[16] For example, a Section 210 action would not require proof that a nuclear employer intentionally engaged in "outrageous" conduct or that a nuclear employee suffered "extreme" emotional distress as a result of that conduct. On the other hand, a state tort claim would not involve consideration of whether the plaintiff had commenced or otherwise participated in an enforcement action under the ERA or the AEA or had suffered discrimination in employment terms and conditions as a result of those efforts (see 42 U.S.C. § 5851(a)).

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[16] This Court has also held that the tort of intentional infliction of emotional distress is legally separate and distinct from an arbitrable dispute " 'concerning rates of pay, rules, or working conditions' " under the Railway Labor Act. *Atchison, T. & S. F. Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (quoting 45 U.S.C. § 153 First (i)). Consequently, the Court held that a remedy for such outrageous conduct, if permitted by the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*, would not be preempted by the primary jurisdiction of federal arbitration boards under the Railway Labor Act. 480 U.S. at 566-71.

Thus, even if a Section 210 claim and a state law cause of action for intentional infliction of emotional distress require the consideration of similar facts, the two controversies are legally distinct. Prosecution of the state claim, then, cannot be said to interfere with a federal interest and should not be preempted.[17] See *Farmer*, 430 U.S. at 305; *Lingle*, 108 S. Ct. at 1883.

B. Recovery For Intentional Infliction Of Emotional Distress Does Not Conflict With The Provisions Of Section 210.

In addition to its faulty "interference" analysis, the district court found three bases upon which English's claim for intentional infliction of emotional distress created a conflict with the remedial provisions of Section 210: the statute's "clean hands" provision, 42 U.S.C. § 5851(g); an omission from the statute of an allowance for punitive damages; and the short thirty- and ninety-day time limits for filing and adjudicating Section 210 claims, 42 U.S.C. § 5851(b)(1). Pet. App. 19a. In order for such conflicts to warrant preemption, however, they must be of such seriousness that "it is impossible to comply with both state and federal law" or "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248. Petitioner's state law tort claim presents no such difficulties.[18]

The district court's first concern was with Section 210's "clean hands" provision, which bars *any* federal relief to an employee who deliberately causes a violation

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[17] In fact, a decision that Section 210 did preempt English's state law claim *would* constitute an obstacle to Congress's express purpose to extend additional protection to employees in the nuclear industry.

[18] Hypothetical conflicts between state and federal law are insufficient as a basis for preemption. *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1432 (1987). See *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978).

of an ERA or AEA requirement. 42 U.S.C. § 5851(g). As the court understood it, the provision was designed to deny Section 210 relief even to those nuclear facility workers who committed a violation "not even remotely related to that on which [the complainant] blew the whistle." Pet. App. 20a. The court concluded that it would be inconsistent to permit those expressly excluded from Section 210 relief by Congress to pursue a remedy under state tort law. *Id.* at 21a.

In reaching this conclusion, however, the district court overlooked the interrelationship between the "clean hands" limitation and the specific remedial duties of the Secretary of Labor under Section 210(b). If the Secretary determines that a complainant has suffered unlawful discrimination under Section 210(a), the Secretary "shall" order the violator to "reinstate the complainant to his former position." 42 U.S.C. § 5851(b)(2)(B). Thus, the purpose of the "clean hands" provision is to deny the remedy of *reinstatement* (with back pay) that might return a known safety violator to work with radioactive materials. This understandable limitation can have no bearing on the availability of a damages remedy for the legally distinct tort of the intentional infliction of emotional distress. State remedies for intentional torts in general and this tort in particular are restricted to recovery of damages; they do not include a remedy such as reinstatement. See *Belknap*, 463 U.S. at 510 (federal interest not implicated because state court cannot order reinstatement as remedy for intentional tort of misrepresentation); see also *supra* at 9 n.5. Thus, nothing a nuclear employee with "unclean hands" could hope to recover in an intentional tort suit could create an obstacle to the achievement of the congressional purpose behind Section 210(g).

The district court's second concern was the omission of any provision for punitive damages for a Section 210

complainant. Pet. App. 21a-22a.[19] Just last term, however, this Court reaffirmed the principle that "state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California v. ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989). Further, there is no inconsistency between a statute designed to benefit employees and a state punitive measure against employers.

Moreover, as this Court has recognized, punitive damages have long been a part of traditional principles of state tort law. *Silkwood*, 464 U.S. at 255. Displacement through preemption of a State's punitive damages remedy will not be inferred simply because a particular congressional enactment is silent on the subject. *Id.* at 251. In permitting punitive damages in suits for intentional infliction of emotional distress, the State of North Carolina has made the judgment that those who engage in extreme and outrageous conduct must not only compensate their victims for their distress but should pay an additional sum to deter them and others from such conduct. Preemption of petitioner's claim would eliminate any state punishment for those who commit outrageous and intentional misconduct, without offering a federal substitute to satisfy the punitive function. For just such reasons, this Court has held that the NLRB's lack of authority to award punitive damages militates for, rather than against, the availability of this "well-established form of relief" in state law cases. *Russell*, 356 U.S. at 646.

Finally, the district court found a potential conflict in Section 210's strict thirty-day time limit for bringing discrimination charges. The court assumed that this provision was intended to promote a prompt filing of such claims; prompt filing, in turn, would lead to prompt reinstatement of the injured employee and to the prompt discovery of nuclear hazards. Pet. App. 22a. As the

[19] Section 210 does, however, provide for an exemplary damages award to the Secretary of Labor if the Secretary successfully sues to enforce an order under the statute. 42 U.S.C. § 5851(d).

court saw it, allowing a claim like English's to languish for the longer state limitations period would compromise the federal interest in fast correction of nuclear safety violations. *Ibid.*

The district court's concerns are based on a serious misperception of the nature of Section 210. First, because reinstatement is not one of the available remedies for intentional infliction of emotional distress, an aggrieved whistleblower has every possible incentive to pursue reinstatement under Section 210. Second, a retaliation claim under Section 210 does not trigger a report of hazardous conditions to the NRC. Rather, the report of such hazardous conditions—and subsequent retaliation for such reporting—triggers the remedial provisions of Section 210. Section 210's time limits, then, have no direct relation to the promptness with which nuclear hazards are reported.

The existence of differing time schemes for pursuing a Section 210 claim and an action for infliction of emotional distress therefore constitutes a distinction without significance—not a conflict. State intentional tort claims have traditionally coexisted with federal administrative schemes with shorter limitations periods. See, *e.g.*, 29 U.S.C. § 160(b) (six-month limitations period for filing unfair labor practice charges with the NLRB).[20]

C. The Courts Are Amply Equipped To Eliminate Any Incidental Effects Of A State Remedy For Intentional Infliction Of Emotional Distress On The Federal Interests Manifested In Section 210.

This Court has repeatedly reaffirmed its faith in the ability of state and federal courts to administer common law remedies and to fashion their procedural rules in ways that are respectful of federal administrative concerns. In *Linn*, for example, the Court indicated its con-

[20] Moreover, as discussed below, the shorter federal limitations periods in Section 210 can actually be expected to *prevent* interference with the federal scheme. See *infra* page 28.

fidence that a court hearing a defamation claim under state law could, through jury instructions, ensure that speech that was protected under federal law in the context of a labor dispute would be distinguished from actionable malicious libel under state law. 383 U.S. at 64-65. *Farmer* similarly recognized that a jury instruction could ensure that damages awarded for the intentional infliction of emotional distress would not include damages traceable to employment discrimination—a matter in the preserve of the NLRB. 430 U.S. at 306. The Court expressed faith that the courts would meet their "responsibility in cases of this kind to assure that the damages awarded are not excessive." *Ibid.*

There is no reason to believe that federal and state courts in North Carolina and elsewhere do not have the tools or will not exercise their responsibility to administer remedies for intentional infliction of emotional distress so as to remove any incidental effects on or conflict with Section 210 proceedings. Evidentiary rulings and instructions to the jury can ensure that a state recovery is not based solely on employment discrimination against a nuclear whistleblower. See *Farmer*, 430 U.S. at 306; *Restatement (Second) of Torts* § 46(1) comment h (the court decides as a matter of law whether conduct is sufficiently "outrageous"). Moreover, the shorter limitations periods for the federal action means that the federal administrative adjudicator will almost invariably proceed first, thereby allowing courts to apply rules of issue preclusion to bar relitigation of distinctly federal issues in state claims. See *University of Tennessee v. Elliot*, 478 U.S. 788, 797 (1986) ("[I]t is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity"). Thus, it is well within the traditional powers exercised by courts to ensure that adjudication of claims for the intentional infliction of emotional distress will not have even incidental effects on the federal interest in protecting nuclear whistleblowers.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

STEVEN K. HOFFMAN
BRADLEY M. CAMPBELL
ROGOVIN, HUGE & SCHILLER
1250 24th Street, N.W.
Washington, D.C. 20037
(202) 467-8300
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

March 8, 1990